TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

[redacted]

[redacted]301

F. SANFORD ROSE, INC., CLAIMANT OF THE SCOW "S-8,"
APPELLANT,

vs.

THE UNITED STATES OF [redacted]ERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

[redacted]

(26,232)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 765.

SANFORD ROSS, INC., CLAIMANT OF THE SCOW "6-S," APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
el	1	1
im of owner	6	4
swer	7	5
tion and order of dismissal as to steam-tug "Leonard Richards"	10	6
tion to dismiss as to P. Sanford Ross, Inc., and order thereon.	10	6
inion, Hand, J.	12	6
al decree	16	8
der amending decree	18	9
rtificate as to jurisdiction	19	10
tice of appeal	20	10
tition for appeal and order allowing appeal	21	11
signments of error	23	11
ation	25	12
rk's certificate	28	13

DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 26, 1917.

Libel.

United States District Court, Southern District of New York.

o the Honorables, the Judges of the District Court of the United States for the Southern District of New York:

The Libel of Information of the United States of America, by its roctor, H. Snowden Marshall, United States Attorney for the outhern District of New York, against the steam tug "Leonard ichards," her engines, tackle and furniture, and against the scow dumper "6-S," her tackle and furniture, in a cause of penalties, vil and maritime, for breach of the provisions of the Act of Con-ess of June 29, 1888 (25 Stat. L. 209), entitled "An Act to pre-nt obstructive and injurious deposits within the Harbor and ad-cent waters of New York City by dumping or otherwise, and to nish and prevent such offenses," as amended by the Act of Con-ess of August 18, 1894 (28 Stat. L. 360) and by the Act of ongress of May 28, 1908 (35 Stat. L. 426) upon information and elief alleges as follows:

First. That at all the times hereinafter mentioned, the Libellant as and still is a Corporation Sovereign.

Second. That at all the times hereinafter mentioned, the said essels were American vessels and are now or about to be within e Southern District of New York and within the admiralty and aritime jurisdiction of the United States and of this Honorable ourt.

Third. That the aforesaid steamtug, at all the times hereinafter entioned was owned by Peter Cahill, and that one Frank Rinschler was the master of said steam tug and in charge thereof.

Fourth. That the aforesaid scow or dumper, at all the times hereinafter mentioned, was owned by P. Sanford Ross, nc., and that one John Doe, whose true name is to the Libellant nknown, was the master and in charge thereof.

Fifth. That on or about December 20-21, 1916, Peter Cahill, oing business under the name of Cahill Towing Line, made in riting an application dated December 20-21, 1916, to the Super-isor of the Harbor of New York, for a permit to be issued under ne laws of the United States for the said steam tug to tow the aid scow or dumper containing 592 cubic yards of mud, through ne Narrows and Lower Bay, to the south and eastward of Scotland ight-Ship, and there deposit her said contents in not less than 15 thoms of water.

Sixth. That pursuant to the aforesaid application, the Supervisor f the Harbor of New York issued a certain permit, numbered 5138 nd dated December 20-21, 1916, granting permission for the said eam tug, Frank Rinschler, master, to pass with said scow or dumper aded with mud as aforesaid, through the Narrows and Lower Bay a point not less than 3 nautical miles southeast of Scotland Light-

Ship, with Ambrose Channel Light Vessel bearing N. E. by N. (magnetic), and there deposit her said contents in not less than 15 fathoms of water.

Seventh. That thereafter and on the 23rd day of December, 1916, the said scow or dumper loaded as aforesaid was in tow of the said steam tug in the Harbor of New York under and pursuant to the said permit.

3 And the said permit defined the precise limits within which the said scow or dumper therein named might discharge her load, and authorized the said steam tug to pass, with the said scow or dumper and her said load, through the Narrows and Lower Bay to a point not less than 3 nautical miles southeast of Scotland Light-Ship, with Ambrose Channel Light Vessel bearing N. E. by N. (magnetic), and there deposit the said load in not less than 15 fathoms of water, and the terms and conditions of the issuance of said permit were therein named, and the regulations governing the deposit of the material contained in said load were set forth and indorsed upon the said permit, in substance and to effect (among other things) that fog, stress of weather, or any other cause should not operate to release the owners or masters and employees of scows and towboats from the penalties imposed for illegal dumping; that no scow or dumper should be discharged except by order of the master of the tug having the same in tow, to be signalled by four sharp blasts of the steam whistle when the tow reaches the dumping grounds;

And the said permit and its indorsements gave full notice of the place of deposit for the said load, and the said steam tug and the said scow or dumper and the owners and masters thereof and each of them were subject to the terms, conditions and requirements of the said permit and its indorsements.

Eighth. That on December 23, 1916, the said Frank Rinschler, being then and there master of said steam tug and in charge thereof, said John Doe being then and there master of said scow or dumper and in charge thereof, did place, discharge, dump and deposit, and aid and abet in so doing, into the said tidal waters of the said Harbor of New York, or waters adjacent thereto, the entire

4 loads of mud contained in all pockets at a place between Cravens Shoal and a point about one mile north of Scotland Light-Vessel, in said Harbor or waters adjacent thereto, and the place where the said load was so dumped, discharged and deposited as aforesaid was not at the dumping, discharging and depositing place defined and specified by the Supervisor of the Harbor as aforesaid and as set forth in said permit, contrary to the form of the statutes in such case provided, to wit, the Act of Congress of June 29th, 1888, as amended, Section 3.

Ninth. That the mud placed, discharged and deposited as aforesaid was brought and carried to the said place where the same was so placed, discharged and deposited in and upon said scow or dumper in tow of the said steam tug, and the said scow or dumper and the said steam tug were then and there used or employed in violating the provisions of the Act aforesaid. The mud placed, discharged

and deposited as aforesaid was not matter flowing or in any manner passing from streets or sewers and did not pass therefrom in a liquid state.

Tenth. That by reason of the placing, discharging and depositing of the mud aforesaid, the said Peter Cahill; said P. Sanford Ross, Incorporated; said Frank Rinschler, master of said steam tug; said John Doe, whose true name is to the Libellant unknown, master of said scow or dumper; became and are liable under the provisions of the Act aforesaid each to pay to the United States of America a penalty of not less than two hundred and fifty dollars ($250.00) and not more than twenty-five hundred dollars ($2500.00), as may be fixed by the Court.

5 Eleventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court, and that by reason thereof and by virtue of the statutes of the United States in such case made and provided, to wit, the said Act of June 29, 1888, as amended, §4, the said steam tug, her engines, tackle and furniture, and said scow or dumper, her tackle and furniture, each became and is liable for payment to the Government of the United States of the pecuniary penalties of the amount aforesaid, no part of which has been paid, and may be proceeded against summarily by way of libel.

Wherefore, libellant prays that due process issue to enforce the said penalties by libel and seizure of the said vessels and that due notice be given to all persons concerned in interest to appear and show cause at the return day of the said process why the same should not be decreed and why the said vessels, their tackle and furniture, should not be condemned and sold to pay the said penalties, and all due proceedings being had thereon, that for the causes aforesaid, and others appearing, this Honorable Court may be pleased to decree for the penalties and fines aforesaid against the said steam tug, her engines, tackle and furniture, and the said scow or dumper, her tackle and furniture, for the said sum of twenty-five hundred dollars ($2500.) each, as liens thereon, and that the said steam tug, her engines, tackle and furniture, and said scow or dumper, her tackle and furniture, may be condemned for the same and sold to satisfy the liens aforesaid, and to pay the penalties aforesaid, and the costs herein; and that the proceeds of such sale, or of such other disposition of said property as the Court shall direct, be distributed, according to law, and for such other and further relief in the premises as to the Court shall seem just.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York, Proctor for Libellant. Office & Post Office Address: U. S. Courts and Post Office Building, Borough of Manhattan, City of New York.

Filed Feb. 6, 1917.

6 District Court of the United States for the Southern District of New York.

UNITED STATES OF AMERICA

vs.

TUG "LEONARD RICHARDS," Her Engines, Tackle, &c., and Scow "6-S," Her Tackle, Furniture, &c.

And now, P. Sanford Ross, Inc., owner of the Scow "6-S" intervening for the interest of itself in the said Scow "6-S" appears before the Honorable Court, and makes claim to the said Scow, &c., as the same are attached by the Marshal under process of this Court, at the instance of United States of America, and the said P. Sanford Ross, Inc., avers that it was in possession of the said Scow at the time of the attachment thereof, and that it is the true and bona fide owner of the said scow and that no other person is the owner thereof;

Wherefore it prays to defend accordingly.

P. SANFORD ROSS, INC.,
By ROLAND T. ROSS,
Ass't Treas.

Sworn to and subscribed this 14th day of February, A. D. 1917, before me.

[SEAL.] ARTHUR D. ALEXANDER,
Notary Public, Orange County.

Certificate filed N. Y. County No. 105; Certificate filed in N. Y. County Register 7009.

EVERETT, CLARKE & BENEDICT,
Proctors.

P. SANFORD ROSS, INC.,
Claimant, 37 Wall St., N. Y. City.

Filed Feb. 15, 1917.

7 *Answer.*

In the United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, Libellant,

against

STEAMTUG "LEONARD RICHARDS," Her Engines, etc., and SCOW "6-S."

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer and exceptions of P. Sanford Ross, Inc., claimant of the Scow "6-S" to the libel of the United States of America alleges as follows:

First. It denies upon information and belief each and every allegation contained in articles numbered Tenth and Eleventh of the libel, except that it admits that no pecuniary penalty has been paid.

Second. Further answering, and by way of exception to the libel, the claimant alleges that no proceeding criminal or otherwise has been instituted against the owner or master or person acting in the capacity of master of said scow, to wit A. Anderson, or the owner or master or person acting in the capacity of master of the tug or
8 towboat which towed the same, and no conviction has been had of them or either of them by reason of the matters and things described in the libel, before any court or judge, and no fine or penalty has been assessed or imposed upon them or either of them, and there is no debt or sum due or owing to the United States from the claimant as owner of said scow, or from said scow, by reason of the matters and things alleged in the libel, and that this Court of Admiralty has no power to hear and determine the controversy arising out of the matters and things alleged in the libel or to assess or decree any fine or penalty in the premises, and that the granting of the relief prayed for in the libel is not within the Admiralty or Maritime jurisdiction of this Honorable Court.

Wherefore claimant prays that the libel may be dismissed with costs.

EVERETT, CLARKE & BENEDICT,
Proctors for Claimant, 37 Wall Street.
Borough of Manhattan, City of New York.

9 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Roland T. Ross, being duly sworn, deposes and says that he is the Assis't Treas. and an officer of P. Sanford Ross, Inc., the claimant herein. That said claimant is a corporation, and that deponent makes this verification as such officer. That the allegations of the answer are true to the best of his knowledge, information and belief.

ROLAND T. ROSS.

Sworn to before me this 17th day of February, 1917.
[L. S.] EDGAR R. ALPAUGH,
Notary Public, New Jersey.

Filed Feb. 23, 1917.

10 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Libellant,

against

STEAMTUG LEONARD RICHARDS and SCOW 6-S.

Before Learned Hand, District Judge.

NEW YORK, May 26, 1917.

Appearances:

John Hunter, Esq., Assistant U. S. Attorney, Proctor for Libellant.
Messrs. Everett, Clarke & Benedict (Mr. Everett), Proctor for P. Sanford Ross, Inc., Claimant.

Mr. Hunter: I move and consent that the libel be dismissed as against the steamtug Leonard Richards.
Motion granted.

Mr. Everett: I move, on behalf of P. Sanford Ross, Inc.,
11 claimant, that the libel be dismissed as against the scow 6 S upon the grounds, more fully set forth in the answer to the libel, that this Court has no jurisdiction to determine the issues or award a decree herein.
The Court: I reserve consideration of Mr. Everett's motion.

Filed Oct. 23, 1917.

12 United States District Court, Southern District of New York.

The Scow "6-S."

This is a libel in rem against the tug "Leonard Richards", dismissed upon the trial, and the Scow "6 S" for illegal dumping in New York Harbor under the Act of June 29, 1888 as amended by the Act of August 17, 1894. The fact of dumping within the limits of the harbor is admitted but the claimant relies upon two points; first, that under Sec. 4 of the Act of June 29, 1888, no libel lies against the scow until the fine or penalty has been assessed against the owner or master in criminal proceedings; second, that under Sec. 3 as amended by the Act of August 17, 1894, the minimum penalty is one hundred dollars and not two hundred fifty dollars.

JOHN HUNTER, JR.,
For the United States.
A. LEO EVERETT,
For the Claimant.

LEARNED HAND, *D. J.*:

The jurisdiction of this court depends upon the following language of Sec. 4 of the Act of June 29, 1888: "Any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any district court." Normally, a civil suit for penalties is in the form of an action for debt, the qui tam action at common-law; it lies only when the penalty is fixed in
13 amount, except for a certain latitude for easy calculation, Stockwell v. U. S., 13 Wall. 531, 542, Carroll v. Green, 92 U. S. 509, 513, Hepner v. U. S., 213 U. S., 103, 108. That a civil proceeding will lie for the collection of an unliquidated penalty, if the purpose be plain, is of course true enough, United States v. Atlantic Fruit Co., 206 Fed. R. 440. In that case the decision seems to have turned upon the fact that any criminal prosecution under the statute was at least doubtful; besides, the suit was in personam, and it does not follow that a libel in rem would have lain, before the fine had been assessed.

In the Strathairly, 124 U. S. 558, it was pretty clearly indicated, however, that the lien was a security only for the fine, and that no libel would lie until it had been assessed. On page 572 the court spoke of an unliquidated penalty as though it must first be directly liquidated, and the final disposition of the cause on page 580, though perhaps not actually involving a decision, clearly shows that the court considered the criminal prosecution as a condition precedent. Were the section here in question drawn like Revised Statutes Sec. 4270 I should therefore feel bound to hold under that case that a criminal prosecution was such condition. It is a doubtful question, but I incline to think that the language used in Sec. 4 of the Act of June 29, 1888, was intended to be more drastic. That section does not in terms impose only a lien, though of course a lien arises; it imposes the penalties, i. e., the fines, upon the boat
14 de novo, a change of expression perhaps not without significance. Moreover, it provides that the boat 'may be proceeded against summarily." I cannot quite see what the meaning of the phrase, "summarily," can be, if it do not include a libel without the condition precedent of a criminal prosecution. The statute is not, it is true, drawn with scientific paucity, but I must still give to all its words some significance, so long as I can, and if I hold that a criminal prosecution must precede a libel, it seems to me to fly in the face of the purpose so expressed. Whether the clause was intended to change the rule in The Strathairly, supra, which had just been decided, no one of course can say, but I think it did.

Judge Dodge in The Scow No. 9, 152 Fed. R. 548, reached the same result upon the authority of The Scow 36, 144 Fed. R. 932. While that point was not expressly raised in The Scow, 36, the statute, Sec. 16, of the Act of March 3, 1899, was in the same language as that at bar. In that case the court disposed of the case on the merits, as well as in the Anjer Head, 46 Fed. R. 664, The Emperor, 49 Fed. R. 751 and The Bombay, 46 Fed. R. 665, where a

recovery was awarded. It has been the uniform practice in this district since 1888 to entertain such libels and this is the first case in which the question has been raised. If the court has no jurisdiction before conviction, I think the matter should be settled by the Supreme Court, to which I will certify the point as the
15 claimant asks.

As to the amount of the fine, it is apparent that in the Act of August 17, 1894, the word, "section," is loosely used for "paragraph," and that there was no intention to change the penalties here in question.

Decree on the libel for the minimum penalty, two hundred fifty dollars, with costs.

May 28, 1917.

L. H.,
D. J.

Filed May 28, 1917.

16 *Final Decree.*

United States District Court, Southern District of New York.

62—98.

UNITED STATES OF AMERICA, Libellant,

vs.

STEAMTUG "LEONARD RICHARDS" and SCOW "6-S."

This cause having come on to be heard and having been reached on the calendar of the June Term, 1917, after hearing Mr. John Hunter for the libellant, Messrs. Foley & Martin for the tug "Leonard Richards," and Mr. A. Leo Everett for the scow.

Now, upon the pleadings and proceedings herein, and due deliberation having been had, it is

Ordered, adjudged and decreed that the libel against the tug be and the same hereby is dismissed, and it is

Further ordered, adjudged and decreed that the libellant, the United States of America, recover against the scow "6-S," her tackle, etc., her claimants and stipulators, the sum of Two hundred and fifty ($250.00) Dollars, together with its costs to be taxed by the Clerk of this Court, and amounting as taxed to the sum of Twenty-Three and 35/100 Dollars, and making altogether the sum of Two Hundred seventy-three and 35/100 Dollars, and that the libellant have execution therefor, and it is

Further ordered, adjudged and decreed that unless an appeal be taken from this decree on behalf of the claimants of said
17 scow within the time fixed by the rules of this Court, the stipulators for costs and value on the part of said scow shall cause the engagement of their stipulations to be performed, or shall show cause within four days' time why execution should not issue

against them, their goods, chattels and credits for the satisfaction of this decree.

LEARNED HAND,
U. S. D. J.

September 18, 1917.

(Endorsed:) A copy received Aug. 2, 1917, Everett, Clarke & Benedict. U. S. District Court, S. D. of N. Y. Filed Sep. 19, 1917.

18 *Order Amending Decree.*

At a Stated Term of the District Court of the United States held in and for the Southern District of New York, in the United States Court House in the Southern District of New York on the 15th day of October, 1917.

Present: Honorable Learned Hand, District Judge.

UNITED STATES OF AMERICA, Libellant,

vs.

STEAMTUG LEONARD RICHARDS and Scow 6-S.

It is hereby

Ordered, the parties hereto consenting as appears by the subjoined stipulation, that the final decree herein, dated September 18, 1917, be amended by substituting the word "May" for "June" in the second line thereof and by inserting between the words "for" and "the" in the fifth line thereof the words "P. Sanford Ross, Inc., claimant of."

LEARNED HAND,
U. S. District Court Judge.

It is hereby consented that the above proposed order may be entered by either party without notice to the other.

FRANCIS G. COFFEY, *U. S. Att'y,*
Proctor for Libellant.
EVERETT, CLARKE & BENEDICT,
Proc. for Claimant.

FOLEY & MARTIN,
Proctors for Tug.

Filed Oct. 15, 1917.

19 *Certificate.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Libellant-Respondent,

vs.

STEAMTUG LEONARD RICHARDS and SCOW 6-S, P. SANFORD ROSS, INC., Claimant-Appellant.

In this suit the District Court of the United States for the Southern District of New York hereby certifies that the claimant in its answer herein, by way of exception, alleged that this court as a court of admiralty had no power to hear and determine the controversy arising out of the matters and things alleged in the libel, and that the suit was not within the admiralty and maritime jurisdiction of this court; that upon the trial the claimant moved to dismiss the libel upon the same ground; that in entering a decree against the Scow 6-S for the sum of $273.35, this court sustained its jurisdiction in the premises and that its jurisdiction was in issue herein.

This certificate is made conformably to Section 238 of the Judicial Code of the United States.

Dated, September 26th, 1917.

WANTON,
United States District Judge,
Southern District of New York.

Filed Sep. 26, 1917.

20 *Notice of Appeal.*

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, Libellant,

vs.

STEAMTUG LEONARD RICHARDS and SCOW 6-S, P. SANFORD ROSS, INC., Claimant.

SIRS: Please take notice that the claimant, P. Sanford Ross, Inc., hereby appeals to the Supreme Court of the United States from the final decree of this Court, dated the 18th day of September, 1917 and entered on the same day in the office of the Clerk of this Court, and from such part of said decree as adjudges that the libellant, United States of America, recover against the Scow 6-S, her tackle, etc., her claimants and stipulators, the sum of $273.35.

Dated, New York, September 26, 1917.

Yours, etc.,

EVERETT, CLARKE & BENEDICT,
Proctors for Claimant, P. Sanford Ross, Inc.,
37 Wall Street, Manhattan, New York City.

To Alexander Gilchrist, Jr., Esq., Clerk of the United States District Court for the Southern District of New York.

Francis G. Caffey, Esq., United States Attorney.

Filed Sep. 26, 1917.

21 *Petition for Appeal and Order Allowing Appeal.*

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, Libellant,

vs.

STEAMTUG LEONARD RICHARDS and SCOW 6-S, P. SANFORD ROSS, INC., Claimant.

P. Sanford Ross, Inc., claimant of Scow 6-S herein, feeling itself aggrieved by the final decree in the above entitled suit, entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 18th day of September, 1917, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignments of error filed herewith, and it prays that this claim may be allowed and that a transcript of the records, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, September 26, 1917.

Yours, etc.,

EVERETT, CLARKE & BENEDICT,
Proctors for P. Sanford Ross, Inc., Claimant,
37 Wall Street, Borough of Manhattan, City of New York.

22 The foregoing appeal is granted, and the claim on appeal herein allowed.

Dated, New York, September 26, 1917.

WANTON,
United States District Judge.

Filed Sep. 26, 1917.

23 United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, Libellant,

vs.

STEAMTUG LEONARD RICHARDS and SCOW 6-S, P. SANFORD ROSS, INC., Claimant.

Assignments of Error.

P. Sanford Ross, Inc., by Everett, Clarke & Benedict, its proctors, assigns error to the final decree entered herein on the ground that the learned Judge erred in finding that the United States District Court, as a court of admiralty and maritime jurisdiction, had jurisdiction to hear and determine the issues herein.

In not finding:

First. That the United States District Court, as a court of admiralty jurisdiction, had no power to render a decree against the vessel or her claimant for a fine or penalty, the same not having been previously imposed by the United States District Court as a court of criminal jurisdiction, as required by the Act of Congress approved June 29, 1888 (25 Stat. L. 209), as amended by the Act of Congress of August 17, 1894 (28 Stat. L. 360) and by the Act of Con-
24 gress of May 28, 1908 (35 Stat. L. 426).

Second. In not sustaining the exception to the jurisdiction set forth in the answer.

EVERETT, CLARKE & BENEDICT,
Proctors for the Claimant and Appellant, P. Sanford Ross, Inc.

Filed Sep. 26, 1917.

25 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Libellant,

against

STEAMTUG LEONARD RICHARDS and SCOW 6 S.

UNITED STATES OF AMERICA, *ss:*

By Hon. Learned Hand, one of the Judges of the United States District Court for the Southern District of New York, to the United States of America:

Whereas, P. Sanford Ross, Inc., claimant of the Scow 6 S, has lately appealed to the Supreme Court of the United States from a final decree, entered in the office of the Clerk of the United States District Court for the Southern District of New York on September 18, 1917, in favor of the United States of America and against the Scow 6 S for the sum of $273.35, and has filed the security required by law, therefore:

You are hereby cited to appear before the Supreme Court of the United States at Washington on the 14th day of November, 1917 to do and receive what may appertain in justice to be done in the premises.

Given under my hand in the City of New York on the 15th
26 day of October in the year One thousand nine hundred and seventeen and *on* the Independence of the United States One hundred and forty-second.

[Seal District Court of the United States, Southern District of N. Y.]

LEARNED HAND,
U. S. District Judge.

27 [Endorsed:] United States District Court, Southern District of New York. United States of America, Libellant, vs. Steamtug Leonard Richards and Scow 6 S. Citation. Everett, Clarke & Benedict, Proctors for Claimant, No. 37 Wall Street, Borough of Manhattan, New York City. Filed Oct. 15, 1917. U. S. District Court, S. D. of N. Y.

28 UNITED STATES OF AMERICA,
Southern District of New York, ss:

UNITED STATES OF AMERICA, Libellant,

vs.

STEAMTUG LEONARD RICHARDS and SCOW 6-S, P. SANFORD ROSS, INC., Claimant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 10th day of November, in the year of our Lord one thousand nine hundred and Seventeen and of the Independence of the said United States the one hundred and Forty-second.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Clerk's fee for certifying record $5.90/100.

ALEX. GILCHRIST, JR.,
Clerk.

29 [Endorsed:] Supreme Court of the United States. United States of America, Libellant, vs. Steamtug Leonard Richards and Scow 6-S, P. Sanford Ross, Inc., Claimant. Transcript of Record. Appeal from the District Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 26,232. S. New York D. C. U. S. Term No. 765. P. Sanford Ross, Inc., claimant of the scow "6-S," appellant, vs. The United States of America. Filed November 20th, 1917. File No. 26,232.

Supreme Court of the United States

No. 30. OCTOBER TERM, 1918.

P. SANFORD ROSE, INC., CLAIMANT OF THE SCHOONER [illegible],

Appellant,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR APPELLANT.

K. LEO EVERETT,

Of Counsel for Appellant.

Supreme Court of the United States.

No. 301 OCTOBER TERM, 1918.

P. SANFORD ROSS, INC., Claimant of the SCOW 6-S,
Appellant,

AGAINST

THE UNITED STATES OF AMERICA.

BRIEF FOR APPELLANT.

This appeal is taken from a final decree of the District Court of the Southern District of New York, made by the Honorable Learned Hand, District Judge, awarding to the United States the sum of $250 and costs against the scow *6-S*.

The libel of the Government was entitled a "libel of information" against the steamtug *Leonard Richards* and Scow *6-S* "in a cause of penalties civil and maritime for breach of the provisions of the Act of Congress of June 29, 1888 (25 Statutes at Large, 209), entitled 'An Act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City by dumping or otherwise and to punish and prevent such offenses'" (fol. 1).

The claimant by its answer to the libel denied the power of the Court to entertain the suit, first on the

ground that the vessel was made liable by the statute for only such penalties as might be imposed in criminal proceedings on the persons involved in the illegal act, and that there had been in this case no conviction of such persons or assessment of penalties, and, second, that the assessment of such penalties was not within the admiralty or maritime jurisdiction of the Court (fols. 7 and 8).

A motion to dismiss the libel was made on the same grounds (fol. 11).

The Act under which the Government was proceeding (Act of June 29, 1888, chapter 496, 25 Statutes at Large, 209, as amended by the Act of August 18th, 1894, 28 Statutes at Large, 360, and the Act of May 28th, 1908, 35 Statutes at Large, 426) forbids by Section 1 the deposit of mud, etc.. in the tidal waters of New York harbor, except within the limits prescribed by the Supervisor, and provides that

> "every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide."

Section 2 provides that the officers of any vessel towing a scow guilty of illegal dumping shall be punishable as provided in Section 1, and in addition have their licenses revoked.

Section 3 prescribes certain regulations as to dumping areas and the markings of vessels engaged in dumping.

Section 4 contains provisions for the disposal of dredged matter and a penalty for the violation thereof, and concludes as follows:

> "Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against, summarily by way of libel in any district court of the United States, having jurisdiction thereof."

The Act has never been construed by this Court, the only appeal in which it was involved having been dismissed for failure to file a proper certificate. *The Bayonne,* 159 U. S. 687.

FIRST POINT.

The purpose of the statute was to make the vessel responsible for such pecuniary penalties as might be assessed against the offending persons in criminal proceedings, and in consequence, the conviction and fining of the persons in criminal proceedings is a condition precedent to the maintenance of a civil suit against the vessel.

This proposition is established by *The Strathairly,* 124 U. S. 558. The suit in that case was brought under Sections 4252, 4253, 4255, 4266 and 4270 of the Revised Statutes. These sections made various provisions for accommodations for passengers on vessels entering or leaving ports of the

United States and prescribed fines and penalties against the master and owner of the vessel for breach of such provisions. Section 4270 provided:

> "The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens on the vessel violating those provisions, and such vessel shall be libeled therefor in any circuit or district Court of the United States where such vessel shall arrive."

The question before the court was as to the application of this section to the various fines and penalties prescribed by the other sections of the act. The Court held that Section 4270 applied to all of them. In respect to such provisions of the act as provided for *unliquidated* fines or penalties, the court said:

> "Neither is it an insurmountable inconvenience affecting this construction of the law that the extent of the lien declared by Section 4270 cannot be ascertained until after a conviction of the master and the assessment of the amount of the fine imposed upon him. This is undoubtedly true in respect to Section 4262, because there the fine is only made ultimately certain by the sentence of the court, to whom the discretion is confided of imposing any amount not in excess of $1,000" (p. 572).

The theory of the court is shown also in the concluding paragraph of the opinion:

> "Our conclusion, therefore, on the whole case is, that the libel sets out a sufficient cause of action, and entitles the United States, upon proof of the facts, to recover under the first and second counts, but that it must be dismissed as to the third. Under the first count, that recovery must be limited to the amount adjudged as a penalty against the master by way of fine upon the criminal information

against him. The penalty recoverable against the vessel, and which by Section 4270 is made a lien upon it, is not an additional penalty, but is the same penalty which by Section 4253 is to be adjudged against the master himself in the criminal prosecution for the misdemeanor, and payment on the part of either is satisfaction of the whole liability. It is the amount of that fine so assessed that is made a lien on the vessel. Under the second count it does not appear that any proceeding for the penalties therein sought to be recovered had been previously taken against the master. The difficulty of further proceeding under that count, however, is removed by a stipulation between the parties contained in the record" (p. 580).

The District Judge appreciated the force of this decision, but thought that the verbal differences between the two statutes, and especially the use of the word "summarily" in Section 4 of the Dumping Act, required a different construction of that Act. The Court accordingly interpreted the use of this word to mean that the vessel might be proceeded against without awaiting the criminal prosecution of the personal offenders. The effect intended for the word in the statute is not quite clear. A meaning different from that ascribed to it by the District Court, however, is suggested by the punctuation. The Act does not provide that the vessel "may be proceeded against, summarily, by way of libel, etc.", but that the vessel "may be proceeded against, summarily by way of libel, etc." This may well disclose an intention by Congress simply to describe the remedy in admiralty by libel as a summary remedy, which in essence it is, without at all meaning to provide that this remedy might be invoked prior to the assessment of the penalties in criminal proceedings. However that may be, the one thing

that does seem beyond controversy is the intent of the statute that the vessel shall be liable only for the penalties imposed upon the personal offenders in criminal proceedings. It clearly was not intended, for example, that the vessel might be proceeded against prior to criminal proceedings and fined $500 and the personal offenders afterwards tried in criminal proceedings and fined $250; nor, *vice versa* that the vessel might be subjected to a penalty of only $250 and the personal offenders on subsequent criminal trial fined $1,500, for which the vessel should not be answerable. It was plainly intended that the Government should have the right to recover from the vessel whatever penalty might be imposed on the personal offenders—no more and no less. Manifestly, this purpose cannot be effected if a civil suit in admiralty against the vessel is entertained and disposed of prior to the judgment in criminal proceedings.

The ruling purpose of the statute, therefore, requires the same decision in regard to this statute as that rendered by this Court in *The Strathairly* (*supra*) in regard to the statute under consideration in that case,—that is to say, that the conviction of the personal offenders and the imposition of pecuniary penalties, if any, upon them, must be deemed to be a condition precedent to the Government's right to proceed against the vessel.

SECOND POINT.

The District Court sitting in admiralty has no power to assess a penalty under the statute.

In every aspect the statute is a criminal statute.

The jurisdiction of the United States District Court is prescribed by Section 24 of the Judicial Code. Subdivision 3 of Section 24 gives jurisdiction "of all civil causes of admiralty and maritime jurisdiction." This necessarily excludes the possibility that there can exist in admiralty a criminal cause of admiralty and maritime jurisdiction such as existed in England by the statute of 15 Richard II, Chapter 2, as amended by 28 Henry VIII, Chapter 15 (Blackstone Commentaries, 268, 299).

Section 24 of the Judicial Code also provides that the District Court shall have jurisdiction of "all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States." This section was construed by Judge Story in

> *United States* v. *Mann*, 1 Gal. 177; Fed. Cases No. 15,718.

The law at that time was in the form enacted by the statute of September 24, 1789, Section 9 (1 Stat. 76), in which the District Court was given "exclusive original jurisdiction of all suits for penalties and forfeitures enacted under the laws of the United States."

In a lengthy opinion Judge Story held that a suit for penalty or forfeiture did not apply to a criminal prosecution:

> "It is, then, incontrovertible that suits for penalties and forfeitures do not include crimes

> and offenses punishable by the district court, and if so, neither can they include such as are punishable by the circuit court. The words then must be restrained to such penalties and forfeitures as may be sued for in a civil action; as, for instance, an action of debt, or on information of debt. For I take it to be clear that an information of debt in the exchequer for a penalty is as much a civil proceeding, as an action of debt" (p. 1154).

The judicial machinery, therefore, as provided by the Judicial Code, does not allow the recovery of a criminal penalty, unliquidated in amount, except as the result of a criminal prosecution. The Government is driven to contend that the harmonious system of jurisdiction established by the Judicial Code has been modified and an anomalous situation created, by the concluding provision of Section 4 of the Dumping Act, and that notwithstanding that this is a criminal penalty, it may be sued for directly in a civil proceeding in admiralty by force of that provision. In

> *United States* v. *Atlantic Fruit Co.*, 206 Fed. Rep. 440.

the Court realized evidently the necessity of fixing the boundary to the civil jurisdiction of the District Court. The statute involved in that case required transportation companies importing alien imigrants to keep posted in the offices of their foreign agencies copies of the United States Immigration Laws, and provided as a penalty for violation thereof a fine not exceeding $500, recoverable in proper United States Court, and provided further that this fine should be a lien on any vessel of the defendant company found within the United States. It was contended that as the statute pro-

vided for a fine uncertain in amount, it could not be sued for civilly. Judge Noyes, writing the opinion of the Court, said:

> "There are two lines of authority leading up to this question. One line holds that while the word 'fine' ordinarily implies a criminal proceeding it may when the amount is fixed and definite be treated as an equivalent of the word 'penalty' and afford the basis for a civil action. Another line supports the proposition that when a statute imposes a penalty indefinite in amount, a civil suit may be brought for its recovery. But we are referred to no authority which goes quite to the question here and holds that a *fine* which is *uncertain* in amount may be sued for civilly" (p. 441).

The Court further observed that the failure to obey the act was not described as an offense or misdemeanor and that no reference was made to any criminal proceeding. It held therefore that a civil recovery was intended rather than a recovery in a criminal action, and sustained the suit.

Judge Ward, dissenting, expressed the opinion that the offense was indictable only, and that therefore a civil action could not be brought for the recovery.

The cases which apparently were in the mind of the court were

Chaffee v. *United States*, 18 Wall. 516;
Carrol v. *Green*, 92 U. S. 509;
Stockwell v. *United States*, 13 Wall. 531.

These cases all hold that the action of debt lies for a statutory penalty where the amount is fixed but does not lie for unliquidated damages.

In *Carrol* v. *Green* (*supra*), the Court said at page 513:

> "The action of debt lies on a statute where it is brought for a sum certain, or where the sum

> is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages."

See also

Hepner v. *United States,* 213 U. S. 103;
The Scotia, 39 Fed. 429;
United States v. *Foster,* 2 Biss. 453, Federal Cases 15,142;
Ex parte McNiel, 13 Wall. 236.

In *Hepner* v. *United States* (*supra*), a suit for liquidated penalty, the Court said:

> "It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal" (p. 108).

The theory upon which liquidated penalties under criminal statutes have been recovered civilly is that upon commission of the offense a debt arises in favor of the Government against the offender for the amount of the penalty which is sued for, not as a punishment but strictly as a debt. The Court thereby applies the same principle which it does in a civil proceedings for forfeiture arising out of breach of a criminal statute. There are many such proceedings, *e. g.,* forfeiture of vessels for piracy, of liquors for breach of the revenue laws. In the forfeiture proceedings the theory is that the thing is the property of the Government the moment the offense is committed, and may be recovered by a proceeding *in rem.*

The theory is as old as the common law. Blackstone says:

> "Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt,

which he had before contracted to discharge (Book III, 160).

"The same reason may with equal justice be applied to all penal statutes, that is such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature and pay the forfeiture incurred to such persons as the law requires" (Book III, 161).

In another passage, speaking of the information of debt by means of which penalties are recovered, he says that it lies—

"upon any contract for moneys due to the King, or for any forfeiture due to the Crown upon breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment and support of the revenue; others, which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in the *qui tam* information or actions of which we have formerly spoken" (Book III, 261-262).

THIRD POINT.

The proceeding is unconstitutional.

The Constitution provides that

"The trial of all crimes, except in cases of impeachment, shall be by jury" (Article 3, Section 2).

We have seen that it is only upon the theory of debt that a proceeding can be taken civilly without

the previous conviction of the offender. Where the theory of debt fails, the proceeding can be viewed only as a criminal proceeding, and this must be, pursuant to our Constitution (just as in England, under their Constitutional practice), by the due course of the Common Law.

LASTLY.

The decree should be reversed and the libel dismissed.

Respectfully submitted,

A. LEO EVERETT,
Of Counsel for Appellant.

April, 1919.

INDEX.

	Page.
Statement of the Case	1
The Statute	2
The Contentions of the Parties	4
Argument	4
1. The pecuniary penalties imposed by the act of June 29, 1888, may be recovered by libel proceedings without a prior criminal conviction	4
2. An unliquidated penalty may be recovered in the present action	9
Conclusion	10

AUTHORITIES CITED.

Dobbin's Distillery v. *United States*, 96 U. S. 395	7
Hepner v. *United States*, 213 U. S. 103	9
Hipolite Egg Co. v. *United States*, 220 U. S. 45	7
Pollock v. *Steamboat Seabird*, 3 Fed. 573	7
Scow 36, 144 Fed. 932	7
Scow 9, 152 Fed. 548	7
The Anjer Head, 46 Fed. 664	9
The Ben R., 134 Fed. 784	7
The Bombay, 46 Fed. 665	8
The C. G. White, 64 Fed. 579	7
The Columbia, 255 Fed. 515	8
The Emperor, 49 Fed. 751	9
The Helvetia, Fed. Cas. 6345	7
The G. L. Garlic, 45 Fed. 380	9
The J. Rich Steers, 228 Fed. 319	8
The Missouri, Fed. Cas. 9652	5, 7
The Palmyra, 12 Wheat. 1	7
The Strathairly, 124 U. S. 558	5
The Three Friends, 166 U. S. 1	7
The Tokai Maru, 190 Fed. 450	7
United States v. *Atlantic Fruit Co.*, 206 Fed. 440	6, 10
United States v. *James W. Elwell & Co.*, 250 Fed. 939	6, 10
United States v. *The Sadie*, 41 Fed. 396	8
United States v. *The Queen*, Fed. Cas. Nos. 16107, 16108	7
United States v. *Various Scows*, 225 Fed. 505	8
Benedict's Admiralty, 4th ed. 167, 8	10
1 Corpus Juris, 1280	10
Act June 29, 1888, 25 Stat. 209	1, 2, 3, 7, 8
Act March 3, 1899, 30 Stat., 1121, 1153	7
Rev. Stat. section 4270	6

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

P. SANFORD ROSS, INC., CLAIMANT OF THE SCOW "6–S," Appellant,
v.
THE UNITED STATES OF AMERICA, Appellee.
No. 301.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a libel, in admiralty, filed against scow "6–S" by the United States under section 4 of the act of June 29, 1888 (25 Stat. 209), as amended. The statute is set out below. It makes the dumping of mud into New York Harbor, within certain limits, unlawful and prescribes penalties for such dumping. Appellant appeared as claimant of the scow. It was admitted by stipulation that there had been dumping within the prohibited area. The district judge made a decree (R. 8) imposing

the minimum money penalty prescribed by the statute.

The error now assigned (R. 11) rests upon the claim that the District Court as a Court of Admiralty was without jurisdiction to make a decree against the vessel or her claimant unless and until the penalty for which the vessel was so made liable had first been imposed by the court, as a criminal court, upon the owner or master, upon due trial and conviction.

THE STATUTE.

The precise contention will become clearer when the statute is set out.

The act of June 29, 1888 (25 Stat. 209), is entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City by dumping or otherwise and to punish and prevent such offenses." Section 1 makes such dumping a misdemeanor and subjects "any person engaged in" or aiding it punishable by fine of not less than $250 nor more than $2,500 or by imprisonment or by both penalties. Section 2 provides the same penalties for engaging, as master of any vessel, in towing any scow loaded with the material forbidden to be dumped to the point of unlawful discharge. Section 3 as amended (28 Stat. 360 and 35 Stat. 426) forbids under heavy fine the towing of scows so loaded unless a permit shall first have been obtained "defining the precise limits

within which the discharge" of such scows may be made. It continues:

> And any deviation from such dumping or discharging places specified in such permit shall be a misdemeanor, and the owner and master * * * of any scows or boats dumping or discharging such forbidden matter in any place other than that specified in such permit shall be liable to punishment therefor as provided in section 1 * * *

Section 4 is as follows:

> That all mud * * * placed on any boat, scow, or vessel for the purpose of being taken or towed * * * to a place of deposit shall be deposited and discharged at such place * * * as in the third section of this act prescribed and not otherwise. Every person, firm, or corporation being the owner of any slip, basin, or shoal from which such mud * * * shall be taken * * * shall severally be responsible for the deposit and discharge of all such mud * * * at such place or within such limits so defined * * *; and for every violation of the provisions of this section the person offending shall be guilty of an offense against this act and shall be punished by a fine equal to the sum of five dollars for every cubic yard of mud * * * deposited or discharged as required by this section.
>
> *Any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way*

of libel in any district court of the United States having jurisdiction thereof. [Italics ours.] (25 Stat., p. 210.)

THE CONTENTIONS OF THE PARTIES.

The appellant contends that section 4 intends to make the vessel only secondarily liable as security for the payment of any penalty which may, under the provisions of the statute be imposed upon her master or owner; it is said to follow that the conviction of the owner or master in a criminal proceeding is a necessary condition precedent to action against the vessel.

To this the Government replies that the section make the vessel itself an offender subject to the pecuniary penalties which are made enforceable summarily by action *in rem*.

In passing it calls attention to the fact that the stipulation that the act forbidden had been done makes the plea highly technical.

ARGUMENT.

I.

The pecuniary penalties imposed by the act of June 29, 1888, may be recovered by libel proceedings without a prior criminal conviction.

The wording of section 4 of the act of June 29, 1888, indicates plainly the intention of Congress to impose upon vessels which had been employed in violating the act unqualified liability for pecuniary penalties imposed by the act. The words are that

"any boat * * * shall be liable" and that it "may be proceeded against summarily."

The opinion of the district judge (R. 7) pointed out that the word "summarily" can be given no meaning unless it is interpreted as authorizing a libel to which no conditions precedent attach. The appellant suggests that the word may have been used as descriptive of the nature of the remedy by way of libel. This interpretation not only violates the grammatical meaning of the language in making an adverb into an adjective, but it also leaves the word without meaning, for a description of the nature of the remedy adds nothing to it. The effect to be given the phrase now under consideration was well stated in *The Missouri*, Fed. Cas. No. 9652:

> The words, "seized and proceeded against summarily," preclude the idea of delay, and import that the proceeding may follow the unlawful act, and rest upon that alone, thus adopting the rule of the maritime law that a ship may be treated as a person and "judged and sentenced accordingly." *The Moses Taylor*, 4 Wall. 427; *The Palmyra*, 12 Wheat. 14.

The Strathairly, 124 U. S. 558, has been relied on by the appellant. This was an action of libel brought pursuant to section 4270, Revised Statutes, to recover for violation of regulations for accommodation of passengers on vessels. By opposing in parallel columns section 4270 and that now before this court, the difference in the remedy provided is patent.

Sec. 4. *Any boat or vessel* used or employed in violating any provision of this Act *shall be liable* to the pecuniary penalties imposed thereby and *may be proceeded against summarily* by way of libel in any District Court of the United States having jurisdiction thereof. [Italics ours.]

Sec. 4270. The amount of the several penalties imposed by the foregoing provisions regulating the carrying of passengers in merchant vessels shall be liens on the vessels violating these provisions and such vessel shall be liable therefor in any Circuit or District Court where such vessel shall arrive.

Section 4270 does not announce summary procedure by way of libel; it simply makes a declaration of a lien. The wording of the section and the holding of this Court in *The Strathairly, supra,* that recovery under it must be limited to penalties imposed in criminal proceedings serve to emphasize the wider latitude of section 4 of the act of June 29, 1888.

The appellant contends that it could not have been the intent of the statute to impose a double liability recoverable both in civil and criminal proceedings and that therefore the civil action must be regarded as simply a means of enforcing criminal liability. Even if the premise be conceded, the conclusion does not follow. The act may be said to give alternative civil and criminal remedies for the recovery of pecuniary penalties and to allow only a single recovery. The decision in *United States* v. *Atlantic Fruit Company,* 206 Fed. 440 as interpreted in *United States* v. *James W. Ellwell & Co.,* 250 Fed. 939 was that the statute there in question gave the United States an election to proceed to recover the fine imposed either in a civil or criminal action.

In cases of condemnation and forfeitures, both at law and in admiralty, the right to proceed therein by libel in rem is independent of the criminal provisions of the acts. *The Palmyra*, 25 U. S. 1, 14; *The Three Friends*, 166 U. S. 1, 49, 50; *Dobbin's Distilling* v. *United States*, 96 U. S. 395; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45.

Original proceedings by libel *in rem* for penalties have been sustained under section 16 of the act of March 3, 1899 (30 Stat. 1153), which prohibits dumping in harbors generally and subjects vessels violating its terms to penalties in substantially the same language as section 4. *Scow 36*, 144 Fed. 932 (C. C. A. 1st Cir.); *Scow No. 9*, 152 Fed. 548 (D. C. Mass.).

In construing like provisions of analogous legislation the lower courts uniformly have held that the liability of the offending vessel for the payment of penalties is a primary obligation, and independent of any criminal proceedings against its master or owner. *The Tokai Maru*, 190 Fed. 450 (C. C. A. 9th Cir.); *The C. G. White*, 64 Fed. 579 (C. C. A. 9th Cir.); *The Ben R.*, 134 Fed. 784 (C. C. A. 6th Cir.); *United States* v. *The Queen*, Fed. Cas. No. 16107; 16108; *The Missouri*, Fed. Cas. No. 9652; *The Helvetia*, Fed. Cas. No. 6345; *Pollock* v. *Steamboat Seabird*, 3 Fed. 573.

The act of June 29, 1888, passed by virtue of the Federal control over navigable waters, in the interest of and for the aid of commerce, intends to protect New York Harbor and its adjacent waters, for the development of

which vast appropriations have been expended. Its enforcement is in aid of navigation for the public good. The Act is an exercise of police powers inherent in the Government. It is remedial and must therefore be construed to effect the purpose it serves.

If the act of June 29, 1888, is construed to require the criminal conviction of the master or owner as a condition precedent to proceedings under the act against any vessel, violations in many instances must go unpunished. Masters of scows are usually irresponsible and shifty, owners frequently nonresidents, and there is always difficulty in apprehending them. Even when apprehended there is opportunity to escape punishment through failure to prove identity or by formal defect in the proceedings. But where there is simply a civil proceeding, the owners of the vessels in the majority of cases admit liability, and a penalty is assessed without a hearing. It follows that if the act is to achieve its remedial purpose of preventing illegal dumping in New York Harbor it should be construed to allow recovery by libel independently of criminal proceedings.

The opinion of the district judge states (R. 8) that it has been the uniform practice of the Federal courts since the passage of the act of June 29, 1888, to allow libels such as the present one independently of criminal proceedings or conviction. In many cases such a libel has been allowed [1] and in other cases while such a libel was disallowed upon the

[1] *United States* v. *The Sadie*, 41 Fed. 396; *The Bombay*, 46 Fed. 665; *The J. Rich Steers*, 228 Fed. 319; *United States* v. *Various Scows*, 225 Fed. 505; *The Columbia*, 255 Fed. 515.

merits of the case, the court made no reference to want of jurisdiction.[1]

The appellant, at the hearing in the District Court stipulated that scow "6–S" was employed in violating the act (R. 6.). This admission, if the owner had been tried criminally, would require a verdict of guilty.

II.

An unliquidated penalty may be recovered in the present action.

Appellant contends that the admiralty court has no criminal jurisdiction and that a civil action to recover a penalty can be brought only when the amount is liquidated.

There is here no question of criminal jurisdiction. It has been repeatedly held by this court that a suit to recover a sum prescribed in a statute as a penalty for its violation is a civil and not a criminal proceeding (*Hepner* v. *United States*, 213 U. S. 103 and cases there cited).

While a civil suit for penalties is ordinarily in the form of an action for debt and while there is some doubt whether an action of debt will lie to recover a sum uncertain in amount, it has been held that a civil

[1] *The G. L. Garlic*, 45 Fed. 380; *The Anjer Head*, 46 Fed. 664; *The Emperor*, 49 Fed. 751.

action of some kind does lie to recover such an unliquidated penalty. *United States* v. *Atlantic Fruit Company, supra; United States* v. *James W. Elwell & Co., supra.* The difficulty which is said to exist relates solely to the form of action at law and has no application to proceedings in admiralty.

Jurisdiction in admiralty for forfeitures and penalties whether liquidated in character or not, has always been exercised. Such jurisdiction in the District Courts exists by virtue of the general grant to them of "all civil causes of admiralty and maritime jurisdiction." Express statutory grant is not essential. Benedict's Admiralty, 4th Ed., pp. 167, 168; 1 Corpus Juris. 1280.

The jurisdiction of the District Court sitting in admiralty enforcing penalties against vessels by proceedings in rem has never been determined by the question whether such penalties are liquidated or unliquidated, and there is no reason for applying such test.

CONCLUSION.

For the reasons stated the appeal should be dismissed.

LaRue Brown,
Assistant Attorney General.

April, 1919.

○

THE SCOW "6-S." [1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 301. Argued April 24, 1919.—Decided June 2, 1919.

The Act of June 29, 1888, c. 496, 25 Stat. 209, as amended, regulating dumping in New York Harbor, renders a vessel employed in violating its provisions directly liable for the same pecuniary penalties that it imposes on individuals, and these may be enforced against the vessel summarily by libel, without awaiting the result of criminal proceedings against the individuals. P. 271. *The Strathairly*, 124 U. S. 558, distinguished.

There is no constitutional or other reason why an unliquidated fine may not be enforced against a vessel in admiralty; and jurisdiction of such a proceeding is conferred upon the District Court by the

[1] The docket title of this case is: *P. Sanford Ross, Inc., Claimant of the Scow "6-S,"* v. *United States.*

Act of 1888, *supra*, whether or not it be regarded as a proceeding for the enforcement of a penalty or forfeiture within § 24 of the Judicial Code. P. 272.

247 Fed. Rep. 348, affirmed.

THE case is stated in the opinion.

Mr. A. Leo Everett for appellant.

Mr. Assistant Attorney General Brown for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a libel *in rem*, brought against a scow under the Act of June 29, 1888, c. 496, 25 Stat. 209, as amended August 18, 1894, (c. 299, § 3, 28 Stat. 360), and May 28, 1908, (c. 212, § 8, 35 Stat. 426), for illegal dumping in New York Harbor. Appellant, as claimant of the scow, denied the jurisdiction of the court to entertain the suit: first, on the ground that by the statute the vessel was made liable only for such penalties as might be imposed in criminal proceedings upon the persons responsible for the illegal act, and there had been in this case no conviction of such persons or assessment of penalties; and, secondly, that the assessment of such penalties was not within the admiralty or maritime jurisdiction of the court. A motion to dismiss on this ground was overruled, the court gave judgment against the scow (247 Fed. Rep. 348), and the claimant appeals to this court upon the jurisdictional question under § 238, Judicial Code.

The statute forbids by § 1 the deposit of mud, etc., in the tidal waters of New York Harbor except within limits prescribed by the supervisor, and provides that "every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction,

be punishable by a fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide."

Section 2 provides that the master, etc., of any vessel towing a scow loaded with prohibited matter to a place of deposit elsewhere than within the limits shall be punishable as provided in § 1, and in addition have his license revoked or suspended.

Section 4 contains provisions for disposal of dredged material, and a penalty for violation thereof, and concludes as follows: "Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against, summarily by way of libel in any district court of the United States, having jurisdiction thereof."

The principal contention of appellant is that the purpose of the statute was to make the vessel responsible only for such pecuniary penalties as might be assessed against the offending persons in criminal proceedings, and hence that the conviction and fining of such persons is a condition precedent to the maintenance of a suit against the vessel. In support of this *The Strathairly*, 124 U. S. 558, is cited. That was a suit brought under §§ 4252, 4253, 4255, 4266, and 4270, Rev. Stats., which contained provisions respecting the carriage of passengers on vessels entering or leaving ports of the United States, and prescribed fines and penalties against the master and owner of the vessel violating such provisions. Section 4270 provided: "The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant-vessels shall be liens on the vessel violating those provisions, and such

vessel shall be libeled therefor in any circuit or district court of the United States where such vessel shall arrive." This court said (p. 580) that the penalty recoverable against the vessel, and by § 4270 made a lien upon it, was not an additional penalty, but the same which by § 4253 was to be adjudged against the master in the criminal prosecution.

We concur with the district judge in the view that the case is distinguishable from the present one because of the substantial difference in the applicable provisions of law. The act of Congress here in question imposes a direct liability upon the vessel for the pecuniary penalties prescribed, and declares that it may be proceeded against summarily by libel in any district court of the United States having jurisdiction thereof. This precludes the idea that the proceeding by libel is to be deferred to await the possibly slow course of criminal proceedings against the persons individually responsible. It treats the offending vessel as a guilty thing, upon the familiar principle of the maritime law, and permits a proceeding against her in any court of admiralty "having jurisdiction thereof"—meaning any court within whose jurisdiction she may be found.

Libels of this character, without previous conviction of the responsible persons, have been entertained under this act from the time of its enactment, and dealt with upon the merits, without question as to the jurisdiction until now. *United States* v. *The Sadie*, 41 Fed. Rep. 396; *The G. L. Garlic*, 45 Fed. Rep. 380; *The Anjer Head*, 46 Fed. Rep. 664; *The Bombay*, 46 Fed. Rep. 665; *The Emperor*, 49 Fed. Rep. 751; *United States* v. *Various Tugs and Scows*, 225 Fed. Rep. 505; *The J. Rich Steers*, 228 Fed. Rep. 319; *The Columbia*, 255 Fed. Rep. 515.

There is no difficulty, on constitutional or other grounds, about assessing an unliquidated fine in the admiralty;

and, if it be not a proceeding for enforcement of a penalty or forfeiture incurred under a law of the United States within the meaning of the 9th subdivision of § 24, Judicial Code, the Act of 1888 itself confers jurisdiction.

Judgment affirmed.